New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 236—NO. 38 THURSDAY, AUGUST 24, 2006 ALM

ANTITRUST

BY WILLIAM T. LIFLAND AND ELAI KATZ

Monopoly Leveraging Doctrine Questioned by Circuit Court

The U.S. Court of Appeals for the Seventh Circuit affirmed dismissal of monopoly leveraging claims brought against an HIV drug maker. It also ruled that a losing bidder for a construction contract did not suffer antitrust injury from a bid-rigging scheme.

Other recent antitrust developments of interest included a Federal Trade Commission (FTC) challenge of a realtors' association rule excluding nontraditional listings from public Web sites and the Department of Justice's decision not to block the merger of local newspapers in Northern California.

Monopoly Leveraging

A patient brought suit alleging that a drug company leveraged its monopoly power over a patented anti-AIDS drug in violation of §2 of the Sherman Act. The complaint alleged that the drug company charged too high a price for the patented drug, which is most effective when used in combination with other related drugs made by the defendant as well as a number of other drug-makers, and at the same time charged too low a price for the drug when sold as part of the drug company's own combination or "cocktail" product.

A district court dismissed the complaint for failure to state a claim and the Seventh Circuit affirmed. The appellate court stated that the antitrust laws should not be used to force the defendant to raise the price for its cocktail and questioned the viability of the monopoly leveraging theory, when untethered to claims of exclusive dealing, refusal to deal, predatory pricing or other established categories of exclusionary conduct. The court added that a firm that has monopoly power over an essential component of a product is not likely to attempt to monopolize an adjacent market because it can extract the whole monopoly profit by charging a high price for the component.

William T. Lifland *Elai Katz*

***Schor v. Abbott Laboratories*, 2006-2 CCH Trade Cases ¶75,354**

Comment: Courts and commentators have criticized the monopoly leveraging doctrine, as does the case reported immediately above, for failing to address of the risk of chilling efficient competitive behavior by monopolists seeking to expand into new markets.

Restraint of Trade

The FTC announced an agreement to settle charges that a Texan association of real estate brokers unlawfully restrained competition in violation of §5 of the FTC Act by refusing to disseminate to public Web sites real estate listings that were not the product of exclusive, full commission listing arrangements. The FTC alleged that the association had market power in the provision of residential real estate brokerage services by virtue of its control of the only multiple l isting service (MLS) in the Austin area. According to the commission, the association did not transmit to real estate Web sites MLS listings subject to alternate terms, such as carrying a lower commission than traditional brokerage arrangements and reserving for homeowners the right to sell on their own. The FTC stated that such alternative arrangements are used to offer unbundled, lower-cost services to consumers, and that the association's policy has substantially reduced their use, denying home sellers marketing options and denying buyers the ability to efficiently view all houses listed by local realtors.

***Austin Board of Realtors*, CCH Trade Reg. Rep. ¶15,903 (July 13, 2006)**

Antitrust Injury

A construction company claimed that it lost Wisconsin government contracts to competitors who pleaded guilty to participating in a bid-rigging scheme and obtaining inside information about the complainant's noncollusive bids from a former employee. A district court dismissed the complaint, finding that it did not properly allege antitrust injury, and the Seventh Circuit affirmed. The appellate court stated that although the complainant was injured because the colluding competitors undercut the complainant's bid, it was not an injury resulting from

William T. Lifland *is senior counsel of the firm of Cahill Gordon & Reindel and* **Elai Katz** *is a partner at the firm.*

reduced output or higher prices because the rigged bids provided lower prices than the complainant quoted to the state government.

***James Cape & Sons Co. v. PCC Construction Co.*, 2006-2 CCH Trade Cases ¶75,337**

Acquisitions

The Department of Justice announced the closing of its investigation into the combination of a number of daily newspapers in Northern California's East Bay region, including the Oakland Tribune and the San Jose Mercury News, after determining that the transaction was not likely to reduce competition substantially. The department stated that the merged newspapers will continue to face competition for readers and advertising from the San Francisco Chronicle.

A district court denied a private plaintiff's application for an order temporarily restraining completion of the same transaction. The court stated that even though the plaintiff raised serious questions, the acquisition should have minimal anticompetitive effects because most of the East Bay papers serve local rather than regional markets.

***"Statement of the Department of Justice on Its Decision to Close Its Investigation of MediaNews Group Inc.'s Acquisition of The Contra Costa Times and San Jose Mercury News" (July 31, 2006)*, CCH Trade Reg. Rep. ¶ 50,213, also available at www.usdoj.gov/atr, and *Reilly v. MediaNews Group, Inc.*, 2006 WL 2092629, No. C 06-04332 SI (N.D. Cal. July 27, 2006)**

Arbitration

A district court vacated an arbitration award against a parcel tanker shipping company alleged to have participated in a price-fixing cartel. The court stated that the panel manifestly disregarded the law by allowing the claimants to arbitrate on behalf of a class. The court accepted the shipping company's argument that the arbitration clauses were drawn from traditional maritime contracts and were never intended to permit class arbitration.

***Stolt-Nielsen SA v. Animalfeeds International Corp.*, 2006-2 CCH Trade Cases ¶75,353 (SDNY)**

Price Discrimination

A food service distributor claimed that a manufacturer of egg and potato products violated §2(a) of the Robinson-Patman Act by extending lower prices to a food service management company than to the distributor. A district court granted summary judgment to the defendants because the distributor did not show competitive injury. The court stated that the distributor did not demonstrate that it was engaged in actual competition with the management company, the favored purchaser, even though both made sales to similar customers, such as hospitals and schools that run institutional cafeterias. The court indicated that the two companies performed different functions within the food services industry and differences in prices were not shown to cause customers to switch between self operation, where they might purchase from the distributor, and outsourced operation of food services, where they might buy from the management company.

The Department of Justice said it had no intention of challenging a proposal by a trucking association to develop model contracts for motor carriers and freight transportation brokers. The DOJ said the model agreements were not likely to reduce competition because rate-related and other significant terms will be left blank and association members will not be required to adopt them.

***Feesers, Inc. v. Michael Foods, Inc.*, 2006-2 CCH Trade Cases ¶ 75,335 (M.D. Pa.)**

Commercial Bribery

A promoter of professional wrestling events alleged that an illegal bribery scheme to obtain toy and video game licenses from the promoter violated §2(c) of the Robinson-Patman Act. A district court dismissed the claim, stating that §2(c) did not apply to services or other intangibles such as licenses.

***World Wrestling Entertainment, Inc. v. Jakks Pacific, Inc.*, 2006-2 CCH Trade Cases ¶75,334 (SDNY)**

Trade Associations

The Department of Justice announced that it had no present intention of challenging a proposal by a trucking association to develop and publicize model contracts for motor carriers and freight transportation brokers. The association asserted that the model agreements will reduce the costs of negotiating contracts and resolving disputes. The department stated that the model agreements were not likely to reduce competition because rate-related and other competitively significant terms will be left blank and the association's members will not be required to adopt them.

***American Trucking Association, Business Review Letter 06-4* (Aug. 10, 2006), CCH Trade Reg. Rep. ¶ 44,106, also available at www.usdoj.gov/atr.**

Comment: Although in the matter reported immediately above the department did not disapprove of model contract terms for use by competitors when price terms are left blank, practitioners should bear in mind that in different contexts some nonprice provisions could be seen as competitively significant.